

HONG KONG / JUDGMENT

SECURITIES AND FUTURES COMMISSION v. "A"

COURT

Court of First Instance

DECIDED

29 November 2007

CASE / FILE NUMBER

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bjbj HCMP 1407/2007 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF FIRST INSTANCE MISCELLANEOUS PROCEEDINGS NO. 1407 OF 2007

IN THE MATTER of and IN THE MATTER of the Securities and Futures Ordinance (Cap. 571)

BETWEEN SECURITIES AND FUTURES COMMISSION Plaintiff and Defendant Before: Hon Kwan
J in Chambers Date of Hearing: 28 November 2007 Date of Decision: 29 November 2007

DECISION

The applications There are two summonses before me. The summons first in time is that issued on 30 July 2007 by the Securities and Futures Commission (the SFC), seeking an order that the interim injunction granted on an ex parte application by Hartmann J on 27 July 2007 be continued. The other summons was issued by the defendant in these proceedings on 2 August 2007, for an order that the injunction be reversed, varied or discharged. In the order of Hartmann J, it was provided that the defendant s name is to appear as in these proceedings and except with the leave of the court, all further proceedings are to be held in chambers and not open to the public. This was designed to preserve the anonymity of the defendant so that there would be no disproportionate damage to reputation as the investigation of the SFC into a case of suspected insider dealing has not been completed. I will refer to the defendant in this decision as the defendant, and the defendant s former employer as the Bank . The present summonses were heard in chambers open to the public as the defendant issued a summons on 23 November 2007 asking for the hearing to be held in the open court. I directed that the hearing be held in chambers open to the public. The SFC s application for an interim injunction was made pursuant

to section 213(6) of the Securities and Futures Ordinance, Cap. 571 and/or Order 29 rule 1 of the Rules of High Court and/or the inherent jurisdiction of the court. The substantive proceedings, which were brought by originating summons, were made pursuant to sections 213(1)(b) and (2)(c) of Cap. 571. I will look at these provisions in detail, as challenge was mounted by Mr McCoy, SC on behalf of the defendant that there is no jurisdiction under these provisions to grant the injunction sought. I understand this is the first occasion the SFC has invoked the statutory power under section 213 for an order to restrain disposition of property in a case of suspected insider dealing. By the injunction granted on 27 July 2007, the defendant was prohibited, until the return date of summons on 3 August 2007, from disposing of, encumbering or transferring out of the jurisdiction his assets up to a value of HK\$46,595,033. In particular, the defendant was prohibited from instructing the Bank, its affiliates or any other intermediaries, to transfer the proceeds of sale of any shares in CITIC Resources Holdings Ltd (CITIC Resources) held by the Bank on behalf of the defendant without written agreement of the SFC or the consent of the court. On 3 August 2007, the injunction was continued until the determination of the present summonses. The amount of HK\$46,595,033 was calculated on the basis that in the event a financial penalty is imposed in relation to a disciplinary action under section 194, the likely penalty would be two times the notional profit of HK\$23,297,516 in respect of the defendant's 26.7 million CITIC Resources shares and the profit of HK\$1,031,706 which was made by the defendant when he sold his 7 million shares in Chinatrust Financial Holdings Co Ltd (Chinatrust). The issues The broad issues I am concerned with in the present summonses may be stated as follows:

- (1) if the application for an interim injunction was authorised by the board of directors of the SFC;
- (2) is there jurisdiction to grant an injunction under section 213 to restrain disposition of property in relation to a prospective financial penalty that may be imposed under section 194;
- (3) whether the terms of the interim injunction granted are inconsistent or contradictory;
- (4) whether it appears to the SFC that the defendant has engaged in insider dealing;
- (5) whether there is risk of dissipation of assets which would prevent enforcement of any order to disgorge profits or to pay a penalty;
- (6) was there material non-disclosure at the ex parte application;
- (7) if there was material non-disclosure, does it justify setting aside or continuing the injunction or should a new injunction be granted; and
- (8) if the injunction is continued or a new injunction granted, should the SFC be required to give an undertaking in damages. I will consider the issues in the order set out above. If the application for interim injunction was authorised by the board of directors of the SFC Mr McCoy submitted that the court had no jurisdiction to entertain the application as it was made ultra vires, in that the board of directors of the SFC had failed to authorise the institution of the application heard on 27 July 2007. Section 10(2)(b) of Cap. 571 provides that

no delegation shall be made by the SFC in respect of a function specified in Part 2 of Schedule 2 to the Ordinance. Among these non-delegable functions is the decision to apply to the Court of First Instance pursuant to section 213(1), see paragraph (74) in that schedule. The board resolution of 23 July 2007 read as follows: Resolved that the Directors approve the following: that the Commission apply to Court under sections 213(1)(b) and 213(2)(c) of the Securities and Futures Ordinance for the appointment of an order restraining or prohibiting [the defendant] from disposing of or otherwise dealing in the amount of any profit gained from the sale of his CITIC Resources and Chinatrust shares; and that all matters ancillary to or consequential upon such application and such appointment be delegated to the Executive Director of Enforcement, and, in his absence, to the Senior Directors of Investigation and Discipline. Mr McCoy submitted that on the face of the resolution, this limited the scope of the application to be made to the amount of any profit gained from the sale of [the defendant s] CITIC Resources and Chinatrust shares from the alleged insider dealing, which the SFC assessed at HK\$23 million odd. The board did not authorise an application to restrain a further and prospective penalty component in relation to disciplinary action under section 194. Leaving aside the question whether there is jurisdiction at all under section 213 to restrain disposal of property to cover prospective penalty in relation to a disciplinary action, which is the next issue to be considered, I do not think the argument on lack of authority by the board resolution is valid. In the first place, even if the application for an injunction in respect of the prospective penalty were not authorised by the board of the SFC, I fail to see how this would render invalid the application made in respect of the profit from insider dealing. Secondly, the board of the SFC has on 19 November 2007 passed a fresh board resolution stating that for avoidance of doubt, it ratifies the application before Hartmann J, it approves the application for the continuation of the injunction and approves the making of a further application under sections 213(1)(b) and 213(2)(c). The SFC is a body corporate by virtue of section 3 of Cap. 571, and can ratify its actions as in the case of any other body corporate. The board of a corporation, whether statutory or otherwise, can ratify its acts by subsequent resolutions and the ratification would have retrospective effect (Pennington s Company Law, 8th ed, pages 153-4; Poon Yee Kan Andrea Eleanor v New Paradigm E-Technology Ltd, HCMP No 3682 of 2003, Reyes J, 14 September 2004, paragraph 84; Fong Poh Yoke & Ors v The Central Construction Co (Malaysia) Sdn Bhd [1998] MLJU 478 at pages [*70] to [*73]). Mr McCoy s contention that the board of the SFC cannot retrospectively ratify its action by a subsequent resolution is incorrect. I am not concerned with a statutory instrument which purports to have retrospective effect, counsel s reliance on authorities in a very different area of the law is misplaced. If there is jurisdiction to grant an injunction to restrain disposition of property in relation to a prospective financial penalty The next issue is whether the SFC has power under section 213 to apply for an injunction to enjoin disposal of an additional HK\$23 million by way of a prospective financial penalty that may be imposed under section 194(2). Under section 194(2), in a disciplinary action, the SFC may order the regulated person guilty of misconduct to pay a pecuniary penalty not exceeding the amount which is the greater of HK\$10 million or 3 times the amount of the profit gained or loss avoided by that person as a result of his misconduct. The defendant is a regulated

person within the meaning of section 194. Section 213(2) sets out the type of orders which may be obtained under sub-section (1) and section 213(2)(c) provides for an order restraining or prohibiting a person from acquiring, disposing of, or otherwise dealing in, any property specified in the order. Mr McCoy contended that section 213(2) does not contemplate any restraining order as to a prospective financial penalty. The order granted under section 213(2)(c) must be referable to the specific misconduct alleged to secure the restraining order in section 213(1). In this case, the relevant misconduct is that contrary to section 270 (this deals with insider dealing as market misconduct, and if the SFC makes a report to the Financial Secretary and an inquiry is instigated, the civil burden of proof applies), section 291 (this makes it an offence to deal as an insider and if a prosecution is brought, the criminal standard of proof applies) and section 300 (which relates to an offence involving fraudulent or deceptive devices in transactions in securities). There is a range of penalties available against an insider dealer where the misconduct or charge is found to be established, such as a fine under section 303, a right to recover compensation under section 305, an order to pay the illicit profits gained or loss avoided to the government under section 257(1)(d), an order to pay the government expenses of the proceedings of the Market Misconduct Tribunal under section 257(1)(e), an order to pay costs of the investigation of the SFC under section 257(1)(f), a right to recover compensation under section 281, and a financial penalty imposed by the SFC under section 194(2) in a disciplinary action. Mr McCoy submitted that the diverse range of penalties available is not contemplated by an order provided for in section 213(2)(c). He also prayed in aid that property specified in an order made under this provision is defined in Part 1 of Schedule 1 to Cap. 571 to include:

- (a) money, goods, choses in action and land, whether in Hong Kong or elsewhere; and
 - (b) obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to property as defined in paragraph (a).
- Hence, the property that may be subject to restraint under section 213(2)(c) does not encompass a prospective financial penalty. I do not agree with this submission, I see no reason why the plain wording in section 213(2)(c) should be read in such a way as to cover the restraining order only in respect of one type of sanction (the disgorgement of illicit profits under section 257(1)(d)) but not the prospective financial penalty under section 194(2). I do not find it helpful to look at other regimes established under different legislation, such as the Drug Trafficking (Recovery of Proceeds) Ordinance, Cap. 405 or the Organised and Serious Crimes Ordinance, Cap. 455. It is true that the SFC does not know at this stage what proceedings against the defendant may be brought, whether this would be proceedings in the Market Misconduct Tribunal, a criminal prosecution, or a disciplinary action, as investigation has not been completed. The statutory power to grant interim injunctions does envisage injunctions being granted before inquiries are complete, see section 213(1)(b). And as submitted by Mr Harris, SC for the SFC, sections 213(1) and (2) apply where it appears to the SFC that there has been a breach of any of the relevant provisions of the Ordinance. Section 213(2)(c) simply says an order may be made restraining the disposal of any property. It does not say on what specific basis such an order should be made. It is also pertinent to

note that the different proceedings that may be brought against the defendant are not mutually exclusive. In my view, on a proper reading of section 213(2)(c), this provision does empower the court to make an order to restrain the disposal of property where it appears to the SFC that a person has breached the provisions of the Ordinance and would come under a potential financial liability, whether this be the disgorging of profits or a penalty in a disciplinary action. The value of the property to be subject to restraint would be by reference to the anticipated action that may be taken regarding the breach, and may include both the elements of profits and penalty, as these consequences are not mutually exclusive. If the terms of the interim injunction granted are inconsistent or contradictory It was submitted on behalf of the defendant that the injunction granted was objectionable in that the provisions in paragraph 1 are contradictory. Paragraph 1(i) prohibited the defendant from transferring assets out of the jurisdiction to the value of HK\$46.5 million odd. Paragraph 1(ii) prohibited the defendant from instructing the Bank, its affiliates or any other intermediaries to transfer the proceeds of sale of any shares in CITIC Resources held by it on the defendant's behalf without the agreement of the SFC or the consent of the court. As one of the affiliates of the Bank referred to in paragraph 1(ii) is an overseas company, it was asserted that this paragraph would be of extra-territorial effect and is inconsistent with paragraph 1(i). I reject this entirely. I agree with Mr Harris there is nothing on the face of section 213(2)(c) to suggest that there is no power to restrain disposition of assets located outside Hong Kong. One must have regard to the nature of operations in large financial institutions in this context, that proceeds of a transaction may not be located in the jurisdiction in which the transaction is effected but may be held by an affiliate or intermediary situated abroad. It would be necessary in this situation, for a restraining order to be effective, to direct the person concerned not to give instructions to an entity outside Hong Kong to deal with his assets. If it appears to the SFC that the defendant has engaged in insider dealing Mr Harris has referred the court to some useful authorities in Australia and Singapore for guidance as to how the jurisdiction to grant an interim injunction under section 213 should be exercised. Under section 213(4), the court, before making an order under sub-section (1), must satisfy itself, so far as it can reasonably do so, that it is desirable that the order be made, and that the order will not unfairly prejudice any person. In considering whether it is desirable that an order be made, the court should ask if the injunction would have some utility or serve some purpose within the contemplation of the statute (*Australian Securities and Investments Commission v Mauer-Swisse Securities Ltd & Anr* (2002) 42 ACSR 605 at 607, per Palmer J). Although the traditional equitable principles that govern the granting of interlocutory injunctions, such as whether there is a serious question to be tried, the risk of dissipation of assets to defeat a judgment, and where the balance of convenience lies, do not limit the scope of the exercise of the statutory power, these traditional principles of equity nevertheless provide a sound basis for a preliminary assessment (*Mauer-Swisse Securities Ltd*, supra. at 613-614; *Australian Securities and Investments Commission v Triton Underwriting Insurance Agency Pty Ltd & Ors* (2004) 48 ACSR 249 at 256, per Barrett J; *Tang Yoke Kheng (trading as Niklex Supply Co) v Lek Benedict & Ors* [2004] 3 SLR 12 at 19, para 19, per Lai Kew Chai J; *Australian Securities and*

Investments Commission v Arafura Equities Pty Ltd (2006) 56 ACSR 429 at 441, per Atkinson J). Before any interim injunction could be granted, there must be established a prima facie case of contravention of a relevant provision of the statute and there is an appreciable, not a fanciful, risk that without the injunction, proper compliance under the statute would be frustrated (*Tang Yoke Kheng*, supra. 19, para 20). Where the application for an injunction is made at the initial stage of an investigation, Waddell CJ had this to say in *Corporate Affairs Commission (NSW) v Walker & Ors* (1986-1987) 11 ACLR 884 at 888: What evidence is necessary before an order should be made will depend on the circumstances. In the case of an application made shortly after an investigation has begun, the evidence may be regarded as sufficient if it establishes the general circumstances, the nature of the investigation and the reason why it is thought that there may be some liability on the part of a relevant person. I do not propose to recite the evidence adduced by the SFC in respect of the suspected insider dealing of the defendant in the shares of CITIC Resources and Chinatrust. The Bank conducted an internal investigation regarding the defendant's trading in the shares and the defendant was summarily dismissed from his employment on 5 June 2007. The Bank's solicitors provided a copy of the internal investigation report to the SFC on 11 June 2007, and on 20 June 2007 the SFC commenced its own investigation. As mentioned earlier, investigation has not been completed. To date, the SFC has not yet been able to interview the defendant. I have considered the first affirmation made by the defendant in which he denied he had breached sections 270, 291 and 300 and alleged that the Bank knew and had approved his trading in both kinds of shares, placing particular reliance on pre-clearance forms completed by him and signed by his designated manager giving approval for trading by him on the dates specified. Apart from that, the defendant has not responded to most of the matters alleged against him in the evidence filed by the SFC. The pre-clearance forms for staff dealing included a number of representations about compliance with internal procedures of the Bank and required the staff member to confirm he is not in possession of any non-public information. In each of the pre-clearance forms, the defendant represented he had no material non-public information concerning the shares in CITIC Resources. I have noted the relevant enquiries made by the SFC with the defendant's designated manager and the Compliance Department of the Bank, which are continuing. Suffices it to say there appears to be a prima facie case of insider dealing. The evidential hurdle to invoke the jurisdiction is satisfied in this instance. If there is risk of dissipation of assets Mr Harris pointed to these matters in support of his case there is a real and present risk that unless the injunction remains, the defendant will remove his assets out of the jurisdiction:

- (1) The defendant's employment was terminated summarily by the Bank on 5 June 2007. His wife resigned from her job in a securities company with effect from 30 August 2007 and she has not been in Hong Kong since 3 September 2007. The defendant has not been in Hong Kong since 7 September 2007. Both are in Beijing, to look after their sick relatives. There is little evidence to suggest that the defendant has any strong ties to Hong Kong.

- (2) The defendant informed the SFC he is staying with his parents in a military residence in Beijing and there is restriction on contact with overseas entities and mail from overseas sent to that address will be returned. This does not appear to be the case from the subsequent enquiries made by the SFC.
- (3) The defendant's assets in Hong Kong are readily realisable in the open market and the proceeds can be easily transferred out of Hong Kong. The defendant has, from 20 June 2007, repeatedly instructed the Bank to transfer or sell some of the securities in his account with the Bank. On 24 and 25 July 2007, the Bank complied with the defendant's instructions to sell HK\$76 million worth of CITIC Resources shares. On 1 November 2007, the Bank complied with the defendant's instructions to transfer various other securities to his account with another bank.
- (4) On 20 July 2007, the SFC discussed with the defendant's solicitors a proposal that the profits gained from the defendant's trading in shares in CITIC Resources and Chinatrust be held on trust until the outcome of the SFC investigation or any subsequent proceedings. This proposal was rejected by the defendant.
- (5) In the letter of the defendant's solicitors to the SFC dated 23 July 2007, the defendant required the SFC as a matter of some urgency to order the immediate release by [the Bank] to [the defendant] without restriction of all his assets.
- (6) It would appear from the transcript of a telephone call the defendant had with his mother in March 2007 he had remitted money to China. He has bought an apartment in Beijing in February 2007. Mr Harris submitted as the SFC had no basis on which to prevent the Bank from carrying out the defendant's instructions in relation to the assets in his account with the Bank, without invoking the power under the statute, the injunction was applied for. There was a real risk the Bank would carry out the defendant's instructions to sell or transfer the remaining CITIC Resources shares held in the account after the defendant had paid off the Bank his debt on margin financing from the proceeds of the shares sold on 24 and 25 July 2007. These considerations as to the risk of dissipation of assets prior to the ex parte application still hold good at present. I agree there is an appreciable risk that the defendant's assets may be transferred out of Hong Kong. If this should happen, it may render the ongoing investigations and any future order that may be made by the Market Misconduct Tribunal and the SFC in a disciplinary action futile and academic. On the evidence adduced by the defendant, at the time the ex parte injunction was granted, he had more than HK\$143 million worth of assets made up of cash and securities in his account with the Bank, which far exceeds the cap of the injunction in the sum of HK\$46.5 million odd. With the repayment of the margin loan to the Bank of HK\$51.8 million odd, he would still have very substantial assets at his disposal if the injunction were to continue. I am inclined to think that the balance of convenience is in favour of granting an injunction to freeze assets to the extent of HK\$46.5 million. If there was material non-disclosure at the ex parte application The law on material non-disclosure in an ex parte application for an injunction had been clearly stated in a number of cases and there is no dispute about this. Mr Harris has given a

comprehensive summary of this with the relevant cases in his skeleton submissions. It is not necessary for me to set out the case law in detail, save to emphasise a few points. For information to be material for this purpose, it must be something which would have affected the judge's decision on the application. It is a matter relevant to the weighing operation which the court has to make (*Thermax v Schott Industrial Glass* [1981] FSR 289 at 298, per Browne-Wilkinson J; *Director of the Serious Fraud Office v A* [2007] EWCA Crim 1927 at paragraph 18, per Hughes LJ). Unless the courts use the sanction only when the non-disclosure is of matters which are relevant to the ex parte judge's weighing operation, an impossible burden would be placed on applicants and their advisers and the court may get itself in a position of what might be called counter-abuse (*Wo Fung Paper Making Fty Ltd v Sappi Kraft (Pty) Ltd* [1988] 2 HKLR 346 at 357H to J, per Hunter JA; *Citibank NA v Express Ship Management Services Ltd & Anr* [1987] HKLR 1185 at 1190H to I, per Fuad JA). The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or its relevance was not perceived, is an important consideration whether the ex parte order should be discharged, although it is not decisive (*Brink's Mat Ltd v Elcombe & Ors* [1988] 1 WLR 1350 at 1357D, per Ralph Gibson LJ). In practice it would be extremely difficult for a defendant applying for discharge to show that the matters which were not disclosed were the subject of a decision not to disclose made in circumstances where it was appreciated there should have been disclosure. In the majority of cases, the matter has to be approached on the basis of considering the quality of the material which was not disclosed without making any final decision whether or not there has been bad faith in the failure to disclose (*Behbehani v Salem* [1989] 2 All ER 143 at 149a to b, per Woolf LJ). Even if it is established there was material non-disclosure which justifies discharge of the ex parte order, the court has a discretion to continue the order or make a new order on terms. The court must assess the degree and extent of the culpability, the importance and significance to the outcome of the application of the matters which were not disclosed, and whether the punishment of discharging the ex parte order would be out of proportion to the failure of the applicant to make full and frank disclosure (*Brink's Mat Ltd*, supra. at 1359B to F, per Slade LJ; *Behbehani v Salem*, supra. at 149g; *Arab Business Consortium International Finance and Investment Co v Banque Franco-Tunisienne* [1996] 1 Lloyd's Report 485 at 492, per Waller J; *Director of the Serious Fraud Office v A*, supra. at paragraph 18). There are broadly three matters which the defendant has alleged should be disclosed in the ex parte application but were not. I will deal with the first two quickly. The first matter is an allegation there was a secret agreement between the Bank and the SFC which led to the provision in paragraph 7 of the injunction that the Bank, its affiliates and any other intermediaries would not be prevented from exercising any right of set-off it may have in respect of any facilities which it gave to the defendant before it was notified of the injunction. This is based on a standard provision in the form for a Mareva injunction in the Practice Direction, it is a conventional qualification to an injunction to take account of a right of set-off so that the injunction would not interfere with third party rights. The SFC was aware of the margin facilities granted by the Bank to the defendant and that the Bank would assert a right of set-off. Paragraph 7 of the injunction is entirely in accordance with the

accepted practice and I am unable to read anything sinister in it to require the matter to be brought specifically to the attention of the ex parte judge. The second matter relates to a complaint that the SFC did not explain to Hartmann J that there are alternative enforcement remedies available in sections 204 to 207 of Cap. 571 without resorting to an injunction in section 213. It was contended that under the earlier provisions a restriction notice may be served on the Bank to prohibit it from disposing of any property held on behalf of the defendant. Mr McCoy submitted that the procedure of a restriction notice would be far less coercive and invasive of the defendant's rights and far less costly to contest, as the defendant could simply apply to the SFC under section 208(1) to withdraw, substitute or vary the prohibition. If the SFC should refuse to withdraw, substitute or vary the prohibition, the defendant would have a right to apply to the Securities and Futures Appeals Tribunal to lift the restriction notice. I am unable to see why this procedure would be less coercive or expensive compared to present proceedings in the High Court. I note that the SFC has doubts if it would be appropriate to issue a restriction notice in this instance against the Bank, which is, strictly speaking, a non-party, taking the view that it should resort to the express statutory mechanism for interim relief against the person suspected of insider dealing. I do not agree the alternative procedure is a matter that should feature in the weighing operation of the ex parte judge. The last broad matter of non-disclosure relates to the agreement or understanding reached on or about 22 June 2007 between the Bank and the SFC, which resulted in a letter of undertaking provided by the Bank to the SFC dated 18 July 2007. This letter of undertaking was not exhibited to the supporting affirmation in the ex parte application. The undertaking given by the Bank was in these terms:

1. Notify the SFC of the amount of the Net Proceeds after deduction of the Cost of Margin.
2. Notify the SFC of the amount of profit realised in relation to [the defendant's] trading in CRH and Chinatrust.
3. Hold the amount mentioned in No. 1 above pending further instructions from the SFC in relation to its treatment.
4. Notify the SFC in writing five business days prior to remitting any amounts to [the defendant] or to his order (whether such remittance is voluntary or by reason of compulsion), For the avoidance of doubt, this undertaking to notify does not require [the Bank] to notify the SFC (in writing or otherwise) prior to using the Proceeds to meet the Cost of Margin. There is a dispute on the facts if, in resisting the defendant's instructions to sell or transfer the securities in his account, the Bank had acted on its own initiative or was expressly directed by the SFC to do so. The SFC maintained it was the former, and the defendant alleged it was the latter. Correspondence on this exchanged between the Bank's solicitors, the defendant's solicitors and the SFC included the letters dated 27 June 2007, 3 July 2007, 13 July 2007, 18 July 2007, 20 July 2007, 23 July 2007 and 26 July 2007. For present purpose, it is not necessary to resolve this dispute on the facts. I attach no weight to the allegations made in the two affirmations of one of the defendant's solicitors, which were couched in intemperate language, and dealt with matters that are submissions, comment or

speculation under the guise of deposing to his belief. Regardless of whether it was the Bank's own initiative or whether it was at the direction of the SFC, there was an undertaking of the Bank to notify the SFC in writing five business days prior to remitting any amounts to the defendant. Mr McCoy submitted that this item in the letter of undertaking is most material and would have affected the judge's decision on the application and should have been disclosed to the court. Not all of the relevant letters were disclosed to Hartmann J, only these letters in the series were disclosed: letter dated 20 July 2007 from the defendant's solicitors to the SFC, letter dated 23 July 2007 from the SFC to the defendant's solicitors, letter dated 23 July 2007 from the defendant's solicitors to the SFC enclosing the notes of a meeting between the defendant's solicitors and the SFC on 20 July 2007, and letter dated 26 July 2007 from the defendant's solicitors to the SFC. The last letter was specifically brought to the attention of the judge by Mr Harris in his oral submissions. Hence, the judge was made aware there was a dispute between the defendant's solicitors and the SFC whether the SFC had directed the Bank to freeze the defendant's account and had acted inappropriately in giving administrative directions without a court order. It was also mentioned in that last letter that the SFC's request to the Bank was that the Bank should notify the SFC in advance if it decided to unfreeze the defendant's assets, so the judge would have been aware of an arrangement of prior notification although he was not told that the prior notice was for five business days. I am inclined to agree with Mr McCoy that the undertaking to give five business days notice in advance to the SFC before remittance of the defendant's funds is material to the weighing operation if the application should be dealt with *ex parte* without notice to the defendant. I find there was material non-disclosure in this respect. I decline to infer bad faith in the failure to disclose, I would approach the matter on the basis of considering the quality of the material which was not disclosed without making any final decision whether or not there has been bad faith in the failure to disclose (*Behbehani v Salem*, *supra*. at 149a to b). I bear in mind that relevant disclosure was made although not to the full extent, and that a very substantial affirmation had to be prepared in a heavy matter of this kind in an urgent application. If there was material non-disclosure, does it justify setting aside or continuing the injunction or should a new injunction be granted? In my view, the clear answer is that the injunction should not be set aside. It would be out of proportion to set aside the injunction on account of the above non-disclosure and would cause injustice if I were to do so. The arrangement to give five business days notice in advance before the remittance of funds would not alter the overall position on the merits of granting an injunction, although it might make a difference as to whether the court should deal with the application without notice to the defendant. I will make an order that the *ex parte* injunction be continued, until the further order of the court. If the SFC should be required to give an undertaking in damages. The last matter I need deal with is whether an undertaking in damages should be required from the SFC. This matter was brought to Hartmann J's attention. He declined to order the SFC to provide an undertaking. It is common ground that the court has a discretion to exercise in this instance. In *F Hoffmann-La Roche & Co A.G. v Secretary of State for Trade and Industry* [1975] AC 295, the injunction was sought by the Crown in law enforcement proceedings. In *Kirklees Metropolitan Borough Council v Wickes*

Building Supplies Ltd [1993] AC 227, the injunction was sought by a local authority charged with the function of enforcing the law in its district in the public interest. In both instances, the House of Lords took the view that an undertaking in damages should not be required. On the other hand, in Customs & Excise Commissioners v Anchor Foods Ltd [1999] 3 All ER 268, the Customs & Excise was required to provide a cross undertaking in damages for the injunction sought, the court taking into account that the nature of the claim for customs duty of a very substantial amount was speculative and the facts were removed from the normal situation where Customs is seeking an injunction to prevent a dissipation of assets by a person who does or may owe customs duty. Here, the purpose of this injunction is not the protection of a proprietary right but has more resemblance to the function of prosecuting those who are alleged to have committed an offence (Hoffmann-La Roche, supra. at 341E, per Lord Reid). I consider the principles in the decisions of the House of Lords to be equally applicable as the situation is similar. Here, the SFC is exercising the function of law enforcer in the public interest. That the SFC is not a government department or a public authority but a statutory corporation is beside the point. It is charged with regulatory functions under Cap. 571 and has a duty to enforce the law under its statutory powers. Mr McCoy drew my attention to the fact that under Australian legislation, the Australian Securities and Investments Commission is exempted by statute from the need to provide a cross undertaking in damages in seeking an injunction where it is acting in the public interest. The fact that our legislation does not have a similar provision does not mean that the discretion should not be exercised in favour of the SFC in not requiring an undertaking. In the exercise of my discretion, I decline to require the SFC to provide an undertaking in damages for granting the interim injunction. Costs Mr Harris asked the court to depart from the usual practice of ordering the costs of a successful plaintiff in an injunction application to be the plaintiff's costs in the cause. This was opposed by Mr McCoy. I see no sufficient reason to depart from that usual practice. As for the point raised by Mr McCoy that the SFC should not have the costs incurred before the fresh board resolution on 19 November 2007, on the basis that the board was not properly authorised until then to apply for an injunction regarding the prospective financial penalty, I do not think that is a reason to deprive the SFC of that part of its costs. The defendant has opposed the entire injunction not just that part relating to the financial penalty, so costs would have been incurred any way in applying for an injunction to restrain the disposal of the profit element. I order the costs of the application including the costs reserved on 27 July 2007 and 3 August 2007 to be the plaintiff's costs in the cause. I will grant a certificate for two counsel. (S Kwan) Judge of the Court of First Instance High Court Mr Jonathan Harris, SC and Mr William Wong, instructed by the Securities and Futures Commission, the Plaintiff Mr Gerard McCoy, SC, Mr Kevin Patterson and Ms Winnifred Kwok, instructed by Messrs Deacons, for the Defendant PAGE - Edited as directed by the Honourable Madam Justice Kwan on 12 December 2007 A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V 1udk 1udk i\$&` r*pa 5<>| P!_HD Vx[Hi <D9X w[{t0 w[{t P!_H <D9X HCCW.dot setup Microsoft Word 9.0 ,Qe|@ ,Qe|@ Judiciary Hong Kong Title Microsoft Word Document MSWordDoc Word.Document.8

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